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The Independent Counsel Statute: A Premature Demise

*Julian A. Cook, III**

I. INTRODUCTION

I think a lot of people are questioning the concept of whether or not . . . we can set up someone who really is totally independent. There's really nobody who has total independence in our system of government, and if they had total independence, they would probably be dangerous, so we're struggling now to see whether or not, putting this statute aside in all probability, there is a way that we can achieve a certain measure of independence, but more accountability. That's what's been lacking over the last 20 years.—*Senator Fred Thompson*¹

With the backdrop of the impeachment trial of President William Jefferson Clinton,² Congress was confronted with the quandary of whether to reauthorize the independent counsel statute. As the statute approached its June 30, 1999 lapse date, lawmakers grappled with and bandied about an array of proposals, including statutory abandonment,³ in the midst of tre-

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1. *Meet the Press* (NBC television broadcast, Feb. 28, 1999) (responding to question posed by Tim Russert with respect to the possibility that the independent counsel statute would be reauthorized).

2. See *This Must Be a Time of . . . Renewal*, WASH. POST, Feb. 13, 1999, at A33 (noting that on February 12, 1999, President Clinton was acquitted in his impeachment trial); David Broder, *Don't Rewrite Independent-Counsel Statute*, DENVER POST, Mar. 3, 1999, at B09; John Whitesides, *Reno: Dump Independent Counsel Law*, PITTSBURGH POST-GAZETTE, Mar. 18, 1999, at A12.

3. See Jerry Seper, *Counsel Statute Hearings on Tap Starr, Judges Who Chose Him to Testify*, WASH. TIMES, Apr. 8, 1999, at A4; John Hanchette, *Law Expiring That Allowed Counsel*, CINCINNATI ENQUIRER, June 30, 1999, at A03. For additional discus-

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mendous political tension and public fervor over the actions of the President, Independent Counsel Kenneth Starr, and members of Congress.⁴ Ultimately, Congress allowed the statute to expire, leaving the prosecution of high-ranking Executive Branch officials in the hands of the Department of Justice.⁵ Advocates of reauthorization could only hope that the issue of reauthorization would be revisited at a later time.⁶

As noted by Senator Thompson, a persistent shortcoming associated with the statute "over the last 20 years" had been the failure to effect a statutory balance which preserved prosecutorial independence and latitude, yet provided sufficient safeguards against the runaway exercise of prosecutorial discretion. Indeed, this objective underlied the statute's enactment. With Watergate serving as the precipitous event, and after five years of legislative effort, the original version of the statute emerged in 1978.⁷ Perceived as a mechanism that would bolster public confidence with respect to the prosecution of high-ranking members of the Executive Branch, the statute removed the prosecutive function from the Justice Department and placed it in the hands of a judicially appointed independent counsel.⁸ However, despite repeated attempts at modification, many believed that the want of adequate safeguards with respect to independent counsel activity, *inter alia*, ultimately undercut the very purpose of the legislation.⁹

In this article, I dispute the contention that the statute's arguable failures with respect to independent counsel accountability mandate statutory abandonment. By allowing the statute to lapse, Congress has necessarily subjected the public to the observance of a prosecutorial process strewn with conflicts of interest, as well as individual defendants to investigations

sion of the proposals for statutory reform and the call for statutory abandonment, see *infra* notes 89-99 and accompanying text.

4. See Eileen McNamara, *Local Politics, Local Cares*, BOSTON GLOBE, Mar. 14, 1999, at B1; Katy Harriger, *Fuming Over a Flawed Statute, Congress Decides Whether to Fix or Finish Off the Independent Counsel*, SEATTLE POST-INTELLIGENCE, Nov. 1, 1998, at E1.

5. See *Independent Counsels Needed: Abuses Shouldn't Overshadow the Law's Benefits*, SARASOTA HERALD-TRIB., June 30, 1999, at 10A.

6. See John Hanchette, *Independent-Counsel Concept May Not Be Dead*, DES MOINES REG., June 30, 1999, at 5.

7. See Harriger, *supra* note 4, at E1.

8. See *id.*

9. See *infra* note 125 and accompanying text.

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and prosecutions pursued by interested prosecutors. Instead, through statutory modification, the coveted balance between independent counsel liberty and accountability can be effectively achieved.

I will demonstrate how, through a proposal I initially presented in the *Harvard Journal of Law and Public Policy*, this balance can be achieved and the statute salvaged.¹⁰ To this end, I commence with a historical retracing of the statute, from its inception in 1978 through its last reauthorization in 1994. Thereafter, I will discuss and critique the leading argument presented in opposition to statutory renewal during the congressional reauthorization hearings in 1999. Finally, I will reintroduce my proposal for statutory reform and proceed to critique it in light of *Morrison v. Olson*,¹¹ the United States Supreme Court case which upheld the statute's constitutionality. Through a detailed dissection of the opinion, I will demonstrate not only the proposal's constitutionality, but also how the proposal effectively regulates independent counsel activity, preserves independent counsel liberty, and ensures appearances of propriety.

II. HISTORY OF THE INDEPENDENT COUNSEL STATUTE

A. 1978 Special Prosecutor Law

Enacted as part of the Ethics in Government Act of 1978,¹² the original special prosecutor law¹³ subjected the following Executive Branch officials to its jurisdiction: the President; Vice President; officials listed in § 5312 of title 5;¹⁴ individuals employed in the Executive Office of the President or the Department of Justice who were compensated at certain minimum

10. See Julian A. Cook, III, *Mend It or End It? What to Do with the Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL'Y 279, 320-37 (1998).

11. 487 U.S. 654 (1988).

12. See Pub. L. No. 95-521, 92 Stat. 1867 (1978).

13. See 28 U.S.C. § 598 (1978) (setting five-year sunset provision for statute).

14. The following officials listed in § 5312 were thus subject to the special prosecutor law: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education and Welfare, Secretary of Housing and Urban Development, Secretary of Transportation, Special Representative for Trade Negotiations, Secretary of Energy, and Secretary of Education. See 5 U.S.C. § 5312 (1976) (amended 1977).

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levels; any Assistant Attorney General; the Director and Deputy Director of Central Intelligence; the Internal Revenue Service Commissioner; any of the aforementioned individuals who held such positions “during the incumbency of the President or during the period the last preceding President held office, if such President was of the same political party as the incumbent President”; and officers of the President’s principal national election or reelection campaign committee.¹⁵

However, as a prerequisite to prosecution, a procedural mechanism involving the Attorney General and a panel of judges had to be followed. If the Attorney General received *specific* information indicating that an official delineated in subsection (b) had “committed a violation of any Federal criminal law” (excluding petty offenses), she was required to conduct a preliminary investigation.¹⁶ If, at the conclusion of the preliminary investigation, she determined “that the matter [was] so unsubstantiated that no further investigation or prosecution” was necessary, the Attorney General was required to inform the “division of the court”¹⁷ of her decision.¹⁸ This decision was

15. 28 U.S.C. § 591(b) (1978) expressly provided:

(b) The persons referred to in subsection (a) of this section are—

- (1) the President and Vice President;
- (2) any individual serving in a position listed in section 5312 of title 5;
- (3) any individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under section 5315 of title 5;
- (4) any individual working in the Department of Justice and compensated at a rate not less than the annual rate of basic pay provided for level III of the Executive Schedule under section 5314 of title 5, any Assistant Attorney General, the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;
- (5) any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and
- (6) any officer of the principal national campaign committee seeking the election or reelection of the President.

Id.

16. 28 U.S.C. § 591(a) provided:

The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

Id. § 591(a). The preliminary investigation could not exceed ninety days. *See id.* § 592(b).

17. *See infra* note 29 and accompanying text.

18. 28 U.S.C. § 592(b)(1). The division of the court was not empowered to appoint

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not subject to judicial review.¹⁹ In the event, however, the Attorney General believed that further investigation or prosecution was warranted, she was required to request the appointment by the division of the court of a special prosecutor.²⁰ In making the application, it was incumbent upon the Attorney General to include sufficient information to enable the court to adequately define the scope of the special prosecutor's jurisdiction.²¹ This jurisdictional grant was not necessarily fixed. It could be supplemented through the referral of what the statute termed "a matter that relates" to the earlier grant.²² Either the Attorney General or the special prosecutor were authorized to seek the expansion of jurisdiction on this basis.²³ In the event a related matter was referred by the Attorney General, the special prosecutor was required to notify the division of the court.²⁴

Notably, a majority of either the majority or minority party members of the Committee on the Judiciary of either the House of Representatives or the Senate could request, in writing, that the Attorney General seek the appointment of a special prosecutor.²⁵ If such a request was submitted, the Attorney General had to provide a written response to the requesting congressional committee detailing the actions, if any, undertaken by the Attorney General in response to the request.²⁶ If an appli-

a special prosecutor in the event the Attorney General declined to seek such appointment. *Id.*; see also discussion of the division of the court *infra* notes 19-24, 29-31, 36-37, 40-45, 73-74, and 88 and accompanying text. If, after her formal declination, the Attorney General received additional information sufficient to justify additional investigation or prosecution, the Attorney General was required to seek the appointment by the court of a special prosecutor within 90 days of the receipt of the information. See 28 U.S.C. § 592(c)(2).

19. See 28 U.S.C. § 592(f).

20. See *id.* § 592(c)(1). Similarly, the statute mandated that the Attorney General "apply to the division of the court for the appointment of a special prosecutor" if she failed to make a determination within the allotted 90 days. *Id.*

21. See *id.* § 592(d)(1).

22. See *id.* § 592(e).

23. See *id.* (providing that the Attorney General may ask the special prosecutor to accept the referral of related matters); see also *id.* § 594(e) (providing that a special prosecutor may seek the referral of related matters from either the Attorney General or the division of the court).

24. See *id.* § 594(e).

25. See *id.* § 595(e).

26. See *id.* The Attorney General had to respond no "later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later." *Id.*

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cation was not submitted, the Attorney General was required to explain the inaction.²⁷ Public disclosure of the Attorney General's written notification was generally prohibited, except to the extent the committee "on its own initiative or upon the request of the Attorney General" believed that release of portions of the notification would not adversely impact the rights of any individual.²⁸

The division of the court, which was part of the United States Court of Appeals for the District of Columbia, consisted of three circuit court judges or justices who were appointed by the Chief Justice of the United States Supreme Court, and served two-year terms.²⁹ As has been noted, upon Attorney General application, the division of the court was required to appoint a special prosecutor, to define his prosecutorial jurisdiction,³⁰ and, upon request of the Attorney General, to expand such jurisdiction.³¹

During his incumbency, the special prosecutor could avail himself of all the investigative and prosecutorial methods traditionally employed by the Department of Justice, including utilizing the grand jury, engaging in civil, criminal, and appellate litigation, challenging claims of privilege, and applying for grants of immunity.³² In carrying out these duties, the special prosecutor could access Department of Justice resources, including, but not limited to, pertinent records, files, and other materials, as well as departmental personnel.³³ The statute also attempted to mandate compliance with the policies of the Justice Department; however, a proviso trailing the mandatory language arguably undermined this congressional intent. Specifically, compliance with departmental policies was required, but only "to the extent that such special prosecutor deem[ed] appropriate."³⁴

In addition, there was an optional, rather indeterminately-phrased reporting requirement that left much discretion to the

27. *See id.*

28. *Id.*

29. *See id.* § 49(a), (d). Senior and retired judges or justices received priority in selection, and service was restricted to only one judge or justice from a particular court. *See id.* § 49(c), (d).

30. *See id.* § 593(b).

31. *See id.* § 593(c).

32. *See id.* § 594(a).

33. *See id.* § 594(d).

34. *Id.* § 594(f).

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special prosecutor with respect to the report's contents. Section 595(a) provided, "A special prosecutor appointed under this chapter *may* make public from *time to time*, and shall send to the Congress statements or reports on *the activities of such special prosecutor*. These statements and reports shall contain such information *as such special prosecutor deems appropriate*."³⁵

Further, prior to the cessation of operations, the special prosecutor was required to submit a final report to the division of the court, detailing "a description of the work of the special prosecutor, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such special prosecutor which was not prosecuted."³⁶ Discretion was retained by the division of the court with respect to the public release of the special prosecutor's reports. Release orders were to give due consideration to the rights of individuals mentioned in the report as well as any pending prosecutions.³⁷ The special prosecutor was also required to inform the House of Representatives "of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment."³⁸

Once appointed, the special prosecutor was largely insulated from removal. Unless impeached or convicted, the special prosecutor could only be removed by the Attorney General "for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such special prosecutor's duties."³⁹ If removed, the division of the court as well as the House and Senate Judiciary Committees were to be provided with a report prepared by the Attorney General detailing the facts and reasons underlying the removal.⁴⁰ Public disclosure of the report by either congressional committee or the division of the court was permitted so long as neither the rights of individuals named in the report nor any pending prosecutions were prejudiced.⁴¹ A special prosecutor was entitled to contest his removal in a civil ac-

35. *Id.* § 595(a) (emphasis added).

36. *Id.* § 595(b)(2).

37. *See id.* § 595(b)(3).

38. *Id.* § 595(c).

39. *Id.* § 596(a)(1).

40. *See id.* § 596(a)(2).

41. *See id.*

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tion brought before the division of the court.⁴²

A special prosecutor seeking to conclude his investigation, could do so upon notifying the Attorney General that all matters within his prosecutorial jurisdiction had “been completed or so substantially completed that it would [be] appropriate for the Department of Justice to complete such investigations and prosecutions,” and by submitting a final report to the division of the court.⁴³ Alternatively, a special prosecutor’s operations could be terminated by the body that appointed him—the division of the court. Subsection (b)(2)⁴⁴ provided, in pertinent part:

The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of special prosecutor at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor or accepted by such special prosecutor under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.⁴⁵

B. 1983 Amendments

In 1983, an array of amendments was effected which was designed to remedy deficiencies that were both structural and perceptible.⁴⁶ Present day usage of the term “independent counsel” stemmed from these amendments, which substituted the term throughout the statute in lieu of “special prosecutor.”⁴⁷ The change, which was purely symbolic, was intended to remove the “Watergate stigma” that was associated with the term “special prosecutor.”⁴⁸

In addition, the 1983 amendments constricted the number of covered officials. Whereas in 1978 *any* officer of the principal

42. *See id.* § 596(a)(3).

43. *Id.* § 596(b)(1)(A).

44. *See id.* § 596(b)(2).

45. *Id.*; *see also* discussion of *Morrison v. Olson* regarding the constitutionality of this provision, as well as its application to a statutory proposal advocated by the author, *infra* notes 130-48, 229-34 and accompanying text.

46. *See* 28 U.S.C. § 598 (1982) (amended 1983) (setting five-year sunset provision).

47. *See id.* §§ 591-98, § 49.

48. *See* KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 77 (1992).

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national campaign committee was subject to the independent counsel law, the 1983 amendments confined the statute's applicability to higher level officials; namely, the chairman and treasurer of the principal committee, as well as "any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President."⁴⁹ In a related adjustment,⁵⁰ the statute was further amended to permit the appointment of an independent counsel to investigate individuals not delineated in § 591(b). Section 591(c) now authorized the appointment of an independent counsel whenever the Attorney General or other Department of Justice officer could not properly investigate allegations of criminal wrongdoing on account of a personal, financial, or political conflict of interest.⁵¹

Section 592 was also subject to some notable revisions. First, the discretion of the Attorney General was augmented with respect to the preliminary investigation. While the Attorney General retained the authority to evaluate the *specificity* of a criminal allegation, she was further empowered to assess the *credibility* of the source of the information.⁵² Thus, the Attorney

49. 28 U.S.C. § 591(b)(8).

50. *See id.* Section 591(b)(3)-(7) was also amended to read, in pertinent part: (3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office.

Id. § 591(b)(3)-(7).

51. *See id.* § 591(c).

52. *See id.* § 592(a)(1). Author Terry Eastland noted the reason underlying this amendment:

The "specific information" standard affected not just the [Hamilton] Jordan case. In his testimony, Associate Attorney General Rudolph Giuliani characterized as a "persistent problem" the "deliberate aim of the drafters to remove any assessment of credibility from the triggering process." It was the experience of the Department, said Giuliani, that a sufficiently specific allegation could trigger the law even when it came from a source that was "inherently incredible" and even when

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General was now authorized to decline further investigation on the basis of a source's want of credibility.⁵³ On the other hand, the 1983 amendments definitively restricted the expanse of an Attorney General's preliminary investigative authority. Section 592(a)(2) explicitly prohibited the Attorney General from convening grand juries, negotiating plea bargains, granting immunity, or issuing subpoenas.⁵⁴

The amendments also eased the Attorney General's capacity to decline the referral of matters for independent counsel prosecution. There was concern that the original standard, which sanctioned the failure to appoint an independent counsel only when a "matter [was] so unsubstantiated that no further investigation or prosecution [was] warranted," too easily triggered independent counsel investigations.⁵⁵ Accordingly, § 592(b)(1) was changed, permitting declination when the Attorney General determined "that there [were] no reasonable grounds to believe that further investigation or prosecution [was] warranted."⁵⁶ In making this determination, the Attorney General

the charge itself was "indisputably incredible."

Congress judged the standard "too low" and decided to raise it by enabling the Attorney General also to consider the credibility of the accuser. The concern for fairness was evident.

TERRY EASTLAND, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL* 71 (1989).

53. Subsection (f) was added to § 593, permitting the division of the court to extend up to 60 days the period to conduct a preliminary investigation, upon a showing of good cause by the Attorney General. *See* 28 U.S.C. § 593(f).

54. *See id.* § 592(a)(2).

55. Eastland made these observations in regard to this amendment:

While the Jordan case exposed a problem faced by the Attorney General in evaluating whether a preliminary investigation should even be opened, the Jordan and [Timothy] Kraft cases both illustrated a difficulty the Attorney General had in making the later decision of whether to apply for a special prosecutor. In those cases the Attorney General was forced to seek a special prosecutor because, as required by Title VI, he was unable to tell the court, at the close of the respective preliminary investigations, that "the matter is so unsubstantiated that no further investigation or prosecution is warranted." This standard prevented the Attorney General from exercising the kind of routine discretion available to all other prosecutors.

... Former Special Prosecutor Arthur Christy, who handled the Jordan case, told the Senate that the standard for referral was "too quick a trigger". . . . So it was that a second standard stated in Title VI was deemed too low. And unfair.

EASTLAND, *supra* note 52, at 72-73.

56. 28 U.S.C. § 592(b)(1). *See also* the changes to § 592(c)(1) (substituting "finds reasonable grounds to believe that further investigation or prosecution is warranted," in lieu of "that the matter is so unsubstantiated as not to warrant further investigation or prosecution") and the changes to § 592(c)(2) (substituting "reasonable grounds exist to warrant" in lieu of "such information warrants").

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was required to comply with policies promulgated by “the Department of Justice with respect to the enforcement of criminal laws.”⁵⁷

The congressional will to better integrate independent counsel activity with departmental policies was evidenced in an array of revisions to § 594. An independent counsel was now permitted “to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution *if to do so would be consistent with the written or other established policies of the Department of Justice.*”⁵⁸ Similarly, subsection (f) was amended to require independent counsel compliance with Department of Justice policies “*except where not possible,*”⁵⁹ in lieu of the previous, more lenient requirement, “to the extent that such special prosecutor deems appropriate.”⁶⁰

Finally, language was appended to § 594(a) permitting an independent counsel to “*consult[] with the United States Attorney* for the district in which the violation was alleged to have occurred.”⁶¹ As observed by Terry Eastland, the objective underlying the attempted integration was an overriding congressional concern for prosecutorial fairness:

Congress also tried to create a rebuttable presumption in favor of special prosecutor adherence to Department policies generally. . . . The legislative history indicates that the burden of explaining any departure from Department policies should be placed on the special prosecutor. “If he does deviate from established practices of the Department, the special prosecutor should thoroughly explain his reasons for doing so in his report to the court at the conclusion of his investigation.” . . . Both of these amendments [to 28 U.S.C. §§ 594 (a) and (f)] contemplated that a special prosecutor would be less likely to act unfairly toward the subject of his investigation the more integrated he was with the institutional thinking of the Justice Department. Even so, the legislative history indicated that Congress rejected the notion that failure of a special prosecutor to follow Justice Department policies constituted grounds for removal. As amended, the statute provided

57. *Id.* § 592(c)(1).

58. *Id.* § 594(g) (emphasis added).

59. *Id.* § 594(f) (emphasis added).

60. 28 U.S.C. § 594(f) (1978).

61. 28 U.S.C. § 594(a)(10) (1983) (emphasis added).

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no sanction for an unjustified departure from Department policy.⁶²

An attorneys' fees provision, albeit limited, was added as well. The provision applied only to the subject of the investigation and permitted the awarding of attorneys' fees upon satisfaction of two requirements: first, that the subject was not indicted; and second, that, but for the independent counsel investigation, the fees would not have been incurred.⁶³ Finally, changes to § 596 marginally liberalized the ability of an Attorney General to remove an independent counsel. The new amendments empowered the removal of an independent counsel for "good cause" in lieu of the previous, higher standard of "extraordinary impropriety."⁶⁴

C. 1987 Amendments

Like the amendments in 1983, the 1987 amendments contained many substantive revisions. Unlike the 1983 amendments, however, the Reauthorization Act of 1987 was notable for its sheer multitude of statutory modifications.⁶⁵

Under the original enactment, the Attorney General was required to conduct a preliminary investigation upon receipt of specific information indicating a violation of federal criminal law by a covered official.⁶⁶ Thus, any preliminary investigation

62. EASTLAND, *supra* note 52, at 73-74.

63. See 28 U.S.C. § 593(g)(1)-(2).

64. *Id.* § 596(a)(1). Eastland explained the congressional motivation underlying the amendment:

This amendment represented a bit of constitutional housekeeping. The removal standard of "extraordinary impropriety" applied to no other officials, not even the heads of independent agencies, who could be dismissed for "good cause." It was an indefinable standard, yet presumably it tied the Attorney General's hands more tightly than "good cause." And it produced this irony: heads of independent agencies performed duties that were in theory less executive than those performed by a special prosecutor, yet they could be more easily removed. Of course, Congress did not want special prosecutors removed once appointed; the legislative history indicated, in fact, that in the view of Congress the failure to obey a presidential order would not constitute a "good cause" for dismissal. But this understanding did not diminish Congress' desire to reduce the statute's potential constitutional vulnerability. By applying to special prosecutors the same removal standard as applied to heads of independent agencies, Congress was hoping to insulate Title VI from constitutional challenge and to provide the Attorney General and the courts a developed body of law by which to understand "good cause."

EASTLAND, *supra* note 52, at 67.

65. See 28 U.S.C. § 599 (1987) (setting five-year sunset provision).

66. See 28 U.S.C. § 591(a) (1978). See *supra* note 16 and accompanying text. Sec-

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was necessarily dependent upon an initial finding by the Attorney General that the information received was sufficiently specific. In 1987, an amendment was added that circumscribed the scope of this initial inquiry. Specifically, § 591(d)(1) limited the Attorney General's consideration to two criteria: first "the specificity of the information received; and [second] the credibility of the source(s) of information."⁶⁷ No other issues, including the intent of the accused, could be considered.⁶⁸ Moreover, another amendment required the Attorney General to complete this inquiry within fifteen days after initial receipt of the information. If, after this time period, the Attorney General determined that the information was specific and from a credible source, or the Attorney General was unable to make a determination within the allotted time, a preliminary investigation would commence.⁶⁹ On the other hand, a preliminary investigation was not required if the Attorney General determined that the information was either nonspecific or from a noncredible source.⁷⁰

A concomitant measure imposed a considerable restriction upon an Attorney General's consideration of an accused's mental state during the preliminary investigative phase. Under the new amendment, an Attorney General could decline a matter for independent counsel referral on this basis only if "there

tion 591(a) was amended in 1987 to read as follows:

The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

28 U.S.C. § 591(a) (1987). Whereas § 591(b) carefully delineated the individuals subject to the Act, § 591(c), enacted in 1987, expanded this list somewhat indefinitely. Subsection (c) authorized the Attorney General to conduct a preliminary investigation with respect to *individuals not delineated in subsection (b)* whenever she received sufficient information indicating a violation of federal law, and an investigation by the Attorney General (or other designated Department of Justice official) posed a "personal, financial, or political conflict of interest." *Id.* § 591(c). Section 591(e) was also enacted which required Attorney General recusal from an investigation whenever "information received under this chapter involves the Attorney General or a person with whom the Attorney General has a current or recent personal or financial relationship"; in such instances, "the next most senior officer in the Department of Justice" (assuming the nonexistence of a disqualifying conflict) shall be appointed to conduct the investigation. *Id.* § 591(e).

67. *Id.* § 591(d)(1).

68. *See id.* § 592(a)(2)(B)(i); *see also* EASTLAND, *supra* note 52, at 85.

69. *See* 28 U.S.C. § 591(d)(2).

70. *See id.*

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[was] clear and convincing evidence that the person lacked such state of mind.”⁷¹ Furthermore, § 592(a)(1), as amended, contained an additional proviso that restricted to ninety days a preliminary investigation conducted pursuant to a congressional request.⁷²

There were also several amendments that addressed congressional concerns pertaining to independent counsel jurisdiction. An amendment to § 593(b), for example, was enacted to address prosecutorial inefficiency attributable to jurisdictional limitations on independent counsel investigative activity.⁷³ Specifically, subsection (b)(3) directed the division of the court, when defining prosecutorial jurisdiction, to

assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.⁷⁴

Thus, in its initial grant of jurisdiction, the division of the court was directed to permit an independent counsel to investigate and prosecute those matters deemed “related” to the subject matter preliminarily investigated by the Attorney General. Therefore, an independent counsel was now empowered to investigate and prosecute certain matters without obtaining prior approval from the Attorney General. Related matters could in-

71. *Id.* § 592(a)(2)(B)(ii). Section 592(c)(1) was also amended to read: “In determining *under this chapter* whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to *the conduct of criminal investigations.*” *Id.* § 592(c)(1) (emphasis added). *See supra* note 56 and accompanying text.

72. *See* 28 U.S.C. § 592(a)(1). In contrast to information received from noncongressional sources, the Attorney General was required to conduct her initial inquiry and her preliminary investigation within 90 days. *See id.*; *see also supra* notes 16-19 and accompanying text; EASTLAND, *supra* note 52, at 85.

73. *See* discussion of this provision in the context of *Morrison v. Olson* *infra* notes 130-48 and accompanying text.

74. 28 U.S.C. § 593(b)(3).

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clude, but were not restricted to, perjury, obstruction of justice, destruction of evidence, and witness intimidation, among other federal criminal offenses.

Whereas § 593(b) concerned “related matter” jurisdiction, another section, 593(c)(2), was added to address jurisdictional issues deemed unrelated to the original grant. Anticipating the situation where an independent counsel uncovered alleged criminal activity extraneous to the original jurisdictional mandate, subsection (c)(2) authorized the independent counsel to present such information to the Attorney General for conducting a preliminary investigation.⁷⁵ Though otherwise governed by § 592, the Attorney General, in such instances, was required to complete the investigation within thirty days of receipt of the information and to give “great weight to any recommendations of the independent counsel.”⁷⁶

Finally, an array of miscellaneous amendments were also enacted that addressed, inter alia, Attorney General and independent counsel conduct, as well as the responsibilities owed to and by the division of the court and Congress.⁷⁷

75. *See id.* § 593(c)(2).

76. *Id.* § 593(c)(2)(A).

77. *See* EASTLAND, *supra* note 52 at 86-87 (summarizing the respective amendments). The following amendments represent a nonexhaustive listing of the remaining amendments enacted in 1987: § 592(a)(1) (requiring Attorney General to “promptly notify the division of the court . . . of the commencement of [a] preliminary investigation and the date of such commencement”); § 592(g)(3) (requiring Attorney General to provide the congressional committee who requested an independent counsel investigation with any documentation that the independent counsel filed with the division of the court; further requiring Attorney General, if an independent counsel appointment is not sought, to provide a report to the congressional committee detailing the reasons underlying the declination); § 592(g)(4) (authorizing congressional committee to release for public consumption documents “as will not in the committee’s judgment prejudice the rights of any individual”); § 593(d) (authorizing the division of the court to request of the Attorney General “further explanation of the reasons” underlying her refusal, after a preliminary investigation, to seek the appointment of an independent counsel); § 593(b)(2) (providing that the division of the court shall appoint as independent counsels individuals with “appropriate experience . . . who” will conduct an efficient and prompt investigation); § 594(h)(1) (requiring independent counsel to file periodic expense reports and a final report detailing the investigative and prosecutorial work of independent counsel’s office); § 594(h)(2) (authorizing the division of the court to publicly release such reports “as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution”); § 596(c) (requiring periodic Comptroller General audits of independent counsel expenditures and submission of a report to Congress upon conclusion of the independent counsel’s investigation).

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D. 1994 Amendments

Though numerous, the amendments enacted in 1994 were comparatively less substantive than in years past. Nonetheless, the 1994 amendments were notable in certain respects.⁷⁸

For example, members of Congress were explicitly added to the list of covered persons.⁷⁹ Though theoretically encompassed within the statute in 1987, the 1994 amendments sought to allay suggestions to the contrary by categorically subjecting members of Congress to independent counsel prosecution.⁸⁰ In addition, the period of time within which the Attorney General was required to determine whether a preliminary hearing was warranted was increased from fifteen to thirty days.⁸¹

The statute, as originally enacted, mandated Department of Justice assistance when requested by an independent counsel. In an attempt to characterize the contemplated assistance, the statute rather generally stated that the Department should provide, *inter alia*, the "personnel necessary to perform such independent counsel's duties."⁸² The 1994 amendments expounded upon this personnel issue by detailing, with somewhat greater precision, the type of assistance contemplated. Section 594(d)(1) was amended by additionally providing that, upon independent counsel request, "prosecutors, administrative personnel and other employees of the Department of Justice" shall be detailed to the office of independent counsel.⁸³

Congress, yet again, tinkered with the language of § 594(f). Specifically, Congress deleted the quoted language which provided that an independent counsel "shall, except where not possible, comply" with departmental policies. The newest amendment now mandated compliance "except to the extent that to do so would be inconsistent with the purposes of this chapter."⁸⁴ Appended thereto was the following additional sentence: "To determine these policies and policies under subsection (j)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of

78. See 28 U.S.C. § 599 (1994) (setting five-year sunset provision until June 30, 1999).

79. See *id.* § 591(c)(2).

80. See 28 U.S.C. § 591(c) (1987).

81. See 28 U.S.C. § 591(d)(2) (1994).

82. 28 U.S.C. § 594(d) (1978).

83. 28 U.S.C. § 594(d)(1) (1994).

84. *Id.* § 594(f)(1). See also *supra* notes 34 and 59 and accompanying text.

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this chapter, consult with the Department of Justice.”⁸⁵

There were also a number of revisions pertinent to independent counsel expenditures. The amendments, though indefinite and subjectively phrased, directed the independent counsel to “(i) conduct all activities with due regard for expense; (ii) authorize only reasonable and lawful expenditures; and (iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable.”⁸⁶

Moreover, the independent counsel was required to follow Department of Justice policies with respect to expenditures, unless compliance was “inconsistent with the purposes of this chapter.”⁸⁷ Finally, the division of the court’s authority to terminate the operations of an independent counsel was appended with certain periodic review requirements. Specifically, the division of the court was instructed to “determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.”⁸⁸

85. 28 U.S.C. § 594(f)(1).

86. *Id.* § 594(j)(1)(A)(i)-(iii).

87. *Id.* § 594(j)(1)(C). In addition, there were several other revisions pertinent to independent counsel expenditures. *See id.* § 594(l)(2) (requiring the Director of the Administrative Office of the United States courts to “provide administrative support and guidance” to an independent counsel); *id.* § 594(l)(3) (directing Administrator of General Services to provide office space—presumptively within a federal building—to independent counsels); *id.* § 594(b)(2) (permitting payment of travel-related expenses incurred by independent counsel); *id.* § 594(b)(3)(A) (prohibiting payment of travel related expenses to independent counsel employees after one year of service “for the purpose of commuting to or from the city in which the primary office of the independent counsel or person is located); *id.* § 595(a)(2) (This section was amended to require independent counsels to annually report to Congress regarding independent counsel activities, “including a description of the progress of any investigation or prosecution conducted by the independent counsel.” Though the report could omit confidential information, the independent counsel was required to provide information “adequate to justify the expenditures that the office of the independent counsel has made.”); *id.* § 596(c) (amending section to further require an independent counsel to submit twice annually a statement of expenditures, and the Comptroller General to conduct a financial review of the statements and to submit the results to Congress).

88. *Id.* § 596(b)(2). For a discussion of litigation challenging the constitutionality of this provision, see *infra* note 234.

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III. 1999 LAPSING OF THE INDEPENDENT COUNSEL STATUTE

A. Arguments Against Renewal

The high drama and tensions associated with Independent Counsel Kenneth Starr's investigation of President Bill Clinton, and the subsequent impeachment hearings, left Congress in a quagmire with respect to the future of the independent counsel law.⁸⁹ While some expressed support for renewal with substantive modifications,⁹⁰ others expressed deep reservations about the law, preferring to return the investigative function to the Attorney General.⁹¹

89. The statute expired on June 30, 1999. See *Independent Counsels Needed; Abuses Shouldn't Overshadow the Law's Benefits*, *supra* note 5; *United States Senate Committee on Governmental Affairs Holds Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999 (statement of Senator Robert G. Torricelli) [hereinafter *Torricelli Testimony*], in which Senator Torricelli addressed Kenneth Starr by stating:

You will forgive me, but I do not understand how a learned man of good judgment allowed things to get to this state of affairs. It is true that you were under a merciless attack. But it was not necessary to pin a target to your chest on all occasions either. And to be fair, you were a contributor to some of your own public demise in the eyes of the American people . . . I believe there is virtually no chance the independent counsel statute will be reenacted, and indeed I believe in this last final chapter of this sorry episode you have done a service to the nation by participating in its demise.

Id.

90. See *United States Senate Committee on Governmental Affairs Holds Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999 (testimony of Senator Lieberman) [hereinafter *Lieberman Testimony*]; see also *U.S. Senate Committee on Governmental Affairs Holds Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999 (testimony of Senator Collins); *Statement of Lawrence E. Walsh Before the United States Senate Committee on Governmental Affairs Hearing on the Future of the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 24, 1999; *Statement of Professor Ken Gormley Before the Senate Committee on Governmental Affairs on the Reauthorization of the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 24, 1999; *Statement of Samuel Dash Before the Committee on Governmental Affairs United States Senate Concerning the Reauthorization of the Independent Counsel Statute*, FED. DOC. CLEARING HOUSE, Mar. 24, 1999 [hereinafter *Dash Testimony*]; *John Q. Barrett Open Session Statement Before the United States Senate Committee on Governmental Affairs, Hearing on the Future of the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 17, 1999.

91. See *Statement of Kenneth Starr Before the United States Senate Committee on Governmental Affairs Hearing on the Future of the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999 [hereinafter *Starr Testimony*]; see also *Statement of Professor Julie R. O'Sullivan, Senate Government Affairs*, FED. DOC. CLEARING HOUSE, Mar. 24, 1999; *Statement of Janet Reno Attorney General Before the Committee on Governmental Affairs United States Senate Concerning the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 17, 1999 [hereinafter *Reno Testimony*]; *Statement of Wil-*

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During the reauthorization debate, structural concerns formed the basis for much of the opposition. Replete and varied in nature, the criticism expressed left few aspects of the statute untainted. The foci of the structural disfavor included the statute's low threshold for the appointment of independent counsels;⁹² the statute's disallowance for the selection of highly qualified independent counsels and for the adequate prioritization of cases and resources;⁹³ reporting requirements that frequently subjected those who were not charged with a crime to severe criticism;⁹⁴ the statute's inability to adequately account for the scope and length of independent counsel investigations and expenditures;⁹⁵ and Attorney General preclusion from utilizing subpoenas, the grand jury, and grants of immunity during preliminary investigations.⁹⁶

Above the statutory critiques, however, lay an overriding criticism that was recurrent throughout the debate: namely, that the statute failed in its primary purpose—to engender public confidence in, and remove politics from, the prosecution of Executive Branch officials. The most notable opponents to reauthorization, Attorney General Janet Reno and Independent Counsel Kenneth Starr, expressed their concern that the independent counsel law failed in its principal mission. As stated by Reno:

liam P. Barr Before the Subcommittee on Commercial and Administrative Law Committee on the Judiciary United States House of Representatives Concerning the Independent Counsel Statute, FED. DOC. CLEARING HOUSE, Mar. 10, 1999; *Statement of Robert S. Bennett Before the Senate Committee on Governmental Affairs*, FED. DOC. CLEARING HOUSE, Mar. 3, 1999 [hereinafter *Bennett Testimony*]; *Repealing the Independent Counsel Act*, *Statement of Alcee Hastings, Committee on the Judiciary Subcommittee on Commercial and Administrative Law*, FED. DOC. CLEARING HOUSE, Mar. 2, 1999.

92. *See Statement of Chairman Fred Thompson Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 17, 1999 [hereinafter *Thompson Testimony*].

93. *See Statement of Benjamin R. Civiletti Before the Subcommittee on Commercial and Administrative Law Committee on the Judiciary United States House of Representatives Concerning the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 10, 1999.

94. *See id.*

95. *See Statement of Philip S. Anderson on Behalf of the American Bar Association Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the United States House of Representatives on the Subject of the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Mar. 10, 1999.

96. *See Bennett Testimony*, *supra* note 91.

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Whenever a high-level official is accused of wrongdoing, the stakes are high. Almost by definition, these are significant cases that generate a lot of interest—in the newspapers, up here on Capitol Hill, and in political circles across the country. As a consequence, just about every decision becomes controversial—be it an Attorney General decision whether to trigger the Act and seek the appointment of an independent counsel, or an independent counsel's decision to pursue a particular prosecutorial course. And I have come to believe that the statute puts the Attorney General in a no-win situation. Or, as I have said in the past: an Attorney General is criticized if she triggers the statute, and criticized if she doesn't.

On the other side of the equation, the decisions of an independent counsel are no less subject to criticism and second-guessing. . . . I'm just saying that it is natural, and that this climate of criticism and controversy weakens—rather than strengthens—the public's confidence in the impartial exercise of prosecutorial power. And that, at the end of the day, undercuts the purpose of the Act. Instead of giving people confidence in the system, the Act creates an artificial process that divides responsibility and fragments accountability.⁹⁷

Starr added his perspective as an independent counsel:

[I]ndependent Counsels are vulnerable in a larger sense In high-profile cases, as Professor Julie O'Sullivan (ph) testified, . . . "those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory [independent counsel] who . . . uncovers wrongdoing." For presidents who are under investigation, Henry Ruth . . . observed, the lesson of recent history is: "[A]ttack, attack, attack the lawyers, attack the witnesses, attack the prosecutor, attack the laws the prosecutor seeks to enforce." . . .

. . . [T]here are several dimensions to this attack strategy. First, independence can be misrepresented as antagonism. Second, the Department of Justice, which has incentives to come to the aid of a U.S. Attorney or a regulatory independent counsel, has no incentive to help a statutory Independent Counsel. With no institutional defender, independent counsels are especially vulnerable to partisan attack. In this fashion, the legislative effort to take politics out of law

97. *Reno Testimony*, *supra* note 91.

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enforcement sometimes has the ironic effect of further politicizing it.⁹⁸

Yet, even among those who questioned the wisdom of reauthorization, there was a realization that the alternative, allowing the law to expire, was, at best, an imperfect remedy. As stated by Senator Fred Thompson:

We may conclude that, on balance, it is best to let the Independent Counsel Law expire and allow the authority to revert back to the Justice Department. However, as we can see, such a prospect raises the question as to what to do about the conflict of interest and public perception problem that remains when an Attorney General insists on keeping in-house a matter involving the President. I would suggest it is going to require much more effort on the part of Congress both in the confirmation process and with regard to its oversight responsibilities. And I think it is ultimately going to require more vigilance by the American people.⁹⁹

B. Shortcomings of the Arguments Against Renewal

To predict whether the independent counsel statute will remain in its defunct state or will ultimately be revived is a speculative task. In this regard, former Senator Howard Baker's suggestion to Congress that there be a "cooling off period"¹⁰⁰ prior to any definitive decision seemed particularly cogent to many, including members of Congress.¹⁰¹ Indeed, it is my belief that the statute should be revived with several modifications.¹⁰² For to return the function of investigating and prosecuting Executive Branch officials to the Attorney General would ignore, or improperly discount, principles of conflict of interest and appearance of impropriety.¹⁰³

98. *Starr Testimony*, *supra* note 91.

99. *Thompson Testimony*, *supra* note 92.

100. *National Digest*, BALTIMORE SUN, Feb. 25, 1999, at 2A.

101. See *Starr Testimony*, *supra* note 91; *Starr Denounces His Job, Defends His Performance*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 15, 1999, at 1A.

102. See Cook, *supra* note 10, at 320-37.

103. See *id.* at 288-97. The instant article will not attempt to critique the various proposals and criticisms with respect to the independent counsel statute; that was the subject of the article I published in the *Harvard Journal of Law and Public Policy*. See Cook, *supra* note 10. Rather, with respect to the arguments presented in opposition to reauthorization, this article will restrict its analysis to the contention that the statute must be abandoned due to its failure to foster public confidence.

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In fact, this is the principal shortcoming in the arguments advanced by Reno and Starr. Their argument that the “climate of criticism and controversy”¹⁰⁴ and the vulnerability of independent counsels to partisan attack¹⁰⁵ undermine public confidence in the prosecutorial process is of doubtless validity. Certainly, repeated allegations of partisanship and bias, especially in high-profile cases, could have an adverse impact upon the listening public.¹⁰⁶ However, to utilize political and media attentiveness as the principal gauge by which to assess the statute’s integrity and effectiveness is misplaced.

What is ignored in the debate surrounding reauthorization are the rights and perspective of the individual defendant. An appearance of impropriety is of relevance not only to the public-at-large, but also on an individual level. The concept’s pertinence to criminal cases applies irrespective of the case’s origin or magnitude, or whether it is celebrated or obscure.¹⁰⁷

*People v. Zimmer*¹⁰⁸ is illustrative of this principle.¹⁰⁹ Defendant Graeme Zimmer “organized and managed” a business, Zimmer Inc., which was located in Hamilton County in New York State.¹¹⁰ However, after the enterprise began to experience certain economic hardships, Zimmer relinquished both his corporate interest as well as his position in the company.¹¹¹ Thereafter, “dissatisfied stockholders” assumed control of the business and, inter alia, hired a Hamilton County District Attorney to serve as its corporate counsel.¹¹² Approximately three

104. *Reno Testimony*, *supra* note 91.

105. *See Starr Testimony*, *supra* note 91.

106. For an extended and intriguing discussion of this argument, see Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 463-79 (1996).

107. For an extended discussion of the applicability of conflict of interest principles to a defendant in a criminal prosecution, see Cook, *supra* note 10, at 288-97.

108. 414 N.E.2d 705 (N.Y. 1980).

109. For an extended discussion of *Zimmer* in the context of prosecutorial conflict of interests, see Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1357-58, 1364-65 (1998).

110. *Zimmer*, 414 N.E.2d at 706.

111. *See id.*

112. *Id.* Though incorporated, the business operated more as a “one-man enterprise” than as an incorporated entity. As noted by the court:

For a long time, by what appears to have been at least silent acquiescence of the other investors, no reins were placed on his managerial conduct, or, if they were, they were not enforced. During his regime, no stockholders’ meetings were ever held and when, midst a corporate financial crisis in the spring of 1977, he elected to surrender his corporate holdings and resign, it had been nearly 10 years since

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months after his retention, the District Attorney, who also happened to be a stockholder in the company,¹¹³ sought and obtained a multi-count indictment charging Zimmer with an array of criminal offenses associated with his business practices.¹¹⁴ During the pertinent time period, the District Attorney, who also tried the case, retained his dual status as stockholder and corporate counsel.¹¹⁵

On appeal, Zimmer presented a conflict of interest argument—namely, that the District Attorney should have been disqualified given his relationship with the corporation and that the trial court, therefore, erred in denying his motion to dismiss the indictment; the Court of Appeals of New York agreed.¹¹⁶ As a prefatory rationale, the Court noted the duty owed by the prosecutor to both the public and the individual defendant:

Central to the issue so sharply drawn is the pivotal point at which a public prosecutor stands in the criminal justice system. Unlike other participants in the traditional common-law adversarial process, whose more singular function is to protect and advance the rights of one side, a District Attorney carries an additional and more sensitive burden. It is not enough for him to be intent on the prosecution of his case. Granted that his paramount obligation is to the public, *he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness.* Put another way, his mission is not so much to convict as it is to achieve a just result.¹¹⁷

Thus, the prosecutor, at a minimum, has dual fidelities; he is obligated to pursue the interests of the people as well as to ensure that justice is not breached. The attainment of justice, however, is compromised whenever a prosecutor is permitted to pursue a prosecution despite the presence of a conflict of interest. In such an instance, it is not the pulse of the general public, as Reno and Starr suggest, that is gauged to determine whether the pursuit is nonetheless worthwhile. Rather, it is

the directors had met.

Id.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *Id.* at 707 (emphasis added).

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the perspective of the defendant that is of equal, if not paramount, significance. Moreover, the argument that the Department of Justice is fully capable of investigating, and prosecuting, alleged Executive Branch wrongdoing, either internally or via a departmental appointment of a special prosecutor, is similarly without force.¹¹⁸ No matter how noble the intentions, or competent the prosecutors, an appearance of impropriety exists,¹¹⁹ particularly from the perspective of the defendant.¹²⁰

118. See *Reno Testimony*, *supra* note 91. Reno elaborated upon her contention that the independent counsel statute should lapse and that the investigative function should be returned to the Department of Justice:

But let me be clear, also, about what our position does not mean. It does not mean that allegations of high-level corruption should be pursued with anything less than the utmost vigor and seriousness of purpose. And it does not mean that the Department considers itself capable of pursuing, in the ordinary course, each and every allegation of corruption at the highest levels of our government. We know that, sometimes, a special prosecutor is in order.

Yet we have come to believe that the country would be best served by a return to the system that existed before the Independent Counsel Act—when the Justice Department took responsibility for all but the most exceptional of cases against high-ranking public officials, and when the Attorney General exercised the authority to appoint a special prosecutor in exceptional situations. . . .

When high-level officials have been accused of wrongdoing, the Department has not hesitated to fully investigate. Over the last two decades, the Department of Justice has obtained the convictions of 13,345 public officials and employees from both sides of the political aisle.

Id.

119. See *Dash Testimony*, *supra* note 90. Senator Dash noted that Attorney General Reno, in 1993, supported reauthorization based upon an inherent conflict of interest that exists whenever the Executive Branch is asked to investigate itself:

Then, in 1993, in a remarkable turnaround for the Justice Department, Attorney General Reno appeared before this Committee and enthusiastically urged the Committee to reauthorize the legislation. She rejected prior Justice Department claims that the department had no conflict in investigating high executive branch officials. Instead, she stated that the reason she supported the independent counsel legislation was that “there is an inherent conflict whenever senior executive branch officials are to be investigated by the department and its appointed head, the Attorney General.” . . . She said in 1993:

The Attorney General serves at the pleasure of the president. Recognition of this conflict does not belittle or demean the professionalism of the department’s career prosecutors. . . . They are not political, they are splendid lawyers . . . I still feel there will be a need for this legislation, based on my experience as a prosecutor for 15 years in Dade County. It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in that system, and you cannot do that when there is a conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor.

Id.

120. See *Cook*, *supra* note 10, at 296-97 (1998) (observing, *inter alia*, though internal Executive Branch investigations and prosecutions will produce a perception, if not a reality, that the subject of those investigations will benefit from favorable treatment,

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And, no matter how firmly and conscientiously a District Attorney may steel himself against the intrusion of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious

. . . .

Assuming he intended to be as fair and objective as fair could be, in presenting this evidence where did his role as partisan corporate attorney end and where did that of non-partisan District Attorney begin? At what point was he serving which of his two masters? To put the questions is to state the problem, a problem instinct with due process implications.

Moreover, even if the actuality or potentiality of prejudice were absent, what of the appearance of things? No matter the good faith and complete integrity of the District Attorney, under these *circumstances what impression could the defendant have had of the fairness of a prosecution* instituted by one with the personal and financial attachments of this prosecutor? Would it have been unreasonable for the defendant—or others—to doubt that the public officer, whose burden it was to screen the complaint for frivolousness and, if necessary, guide its destiny before the Grand Jury, would do so disinterestedly?

It was important that these responsibilities, carried out in the name of the State and under the color of law, be conducted in a manner that fostered rather than discouraged public confidence in our government and the system of law to which it is dedicated. . . . In particular, the District Attorney, as guardian of this public trust, should have abstained from an identification, in appearance as well as in fact, with more than one side of the controversy.¹²¹

The unavoidable conflict of interest inherent in internal Executive Branch prosecutions necessarily compromises principles of fairness and appearances of propriety with respect to the investigation and prosecution of high-ranking Executive Branch officials. The dual loyalties owed by the Executive

this may not always be the reality and at times the subject may be prosecuted not due to the evidence accrued during a particular investigation but rather to appease political opponents).

121. *Zimmer*, 414 N.E.2d. at 707-08 (citation omitted) (emphasis added).

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Branch prosecutor produces an appearance problem that adversely skews the perceived fairness of such prosecutions in the eyes of both the individual defendant and the public at large. Therefore, it is essential that a prosecutorial process be in place that ensures, from the perspective of the defendant as well as the public, that high-ranking members of the Executive Branch are fairly and equitably investigated and prosecuted for alleged criminal wrongdoing.¹²² Indeed, both the apparent and actual fairness of a prosecutorial process is necessarily rooted in the integrity of the procedures it adopts; for if the procedures adopted are intrinsically just, the fairness of the process, in appearance and in fact, will transcend any adverse criticism.

IV. PROPOSAL FOR REFORM

With this in mind, I have proposed certain reforms to the independent counsel law which, I submit, effectively mandate compliance with Department of Justice regulations,¹²³ preserve prosecutorial independence, promote fairness, and avoid the appearances of impropriety inextricably associated with statutory abandonment.¹²⁴ A recurrent, disquieting concern vociferously expressed during the reauthorization debate pertained to the exercise of independent counsel discretion with respect to investigative strategies. Many believed that some independent

122. See *Lieberman Testimony*, *supra* note 90.

Twenty years ago, when Watergate was the nation's most recent resonant political scandal, Congress passed the statute we're now reviewing. Our predecessors were clearly motivated by the highest of ideals, to ensure that the rule of law would be applied scrupulously even in cases involving our nation's most powerful leaders, even in cases involving the president. In my opinion, the law has worked in support of that worthy purpose more often than not. And I note that most Americans seem to agree; at least that's what the polls indicate, which show that a healthy majority actually supports reauthorization of the statute, notwithstanding the recent controversies that have surrounded it.

Id.

123. The United States Attorneys' Manual regulates the conduct of United States Attorneys and their Assistants with respect to certain pretrial, plea, and post-trial practices. See UNITED STATES ATTORNEYS' MANUAL, § 9-2.400 (1997). The Manual, which is part of the aforementioned regulations of the Department of Justice, consists of an array of regulations that require reporting to, consultation with, or approval from, the Department of Justice prior to the pursuit by a prosecutor of a wide array of pretrial, plea, and post-trial strategies. See Conference, *The Independent Counsel Process: Is it Broken and How Should it Be Fixed?* 54 WASH. & LEE L. REV. 1515, 1546 (1997) [hereinafter Conference].

124. For an extended discussion of these proposed reforms, see Cook, *supra* note 10, at 316-36.

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counsels, particularly Kenneth Starr, habitually disregarded Department of Justice guidelines during the conduct of their affairs.¹²⁵ Indeed, in light of the permissive language of § 594(f), the periodic failure of independent counsels to adhere to Department of Justice regulations should have been anticipated.¹²⁶ Though I concur with many of the aforementioned sentiments, I disagree that the solution lies in statutory disso-

125. *See Lieberman Testimony, supra* note 90.

The Department of Justice is currently considering whether Judge Starr failed to follow certain Department of Justice guidelines which are supposed to apply to every citizen. So I'd be interested in learning how much weight Judge Starr gave to those guidelines in his conduct as independent counsel. How he feels about the guidelines and whether we should find a way to better emphasize adherence to them and receive consultations—require consultations with the department.

Id.; *see also U.S. Senate Committee on Governmental Affairs Holds Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999 (testimony of Senator Levin). Senator Levin stated:

Looking at the record of your office, Mr. Starr, in my judgment, despite our best efforts to establish reasonable limits on the power of independent counsels, you and your office have managed to exceed those limits. In the ABC News case, you stated to the court that the relevant Justice Department regulations did "[n]ot govern an independent counsel." In my judgment, you've gone beyond what an average prosecutor would do in the investigation of a private citizen and you have failed to comply with Justice Department policies as intended under the Independent Counsel law. . . . So the key limits that the law intended to put on the power of independent counsels have not proven effective. And I believe that we need to determine in the months ahead whether or not we can amend the statute or remedy that problem as I perceive it, so that the limits on power which are so important to the constitutionality of this statute and to its fairness can be made practically effective.

Id.; *see also Torricelli Testimony, supra* note 89. Addressing Independent Counsel Starr, Senator Torricelli stated, "The Lewinsky matter, the Steele matter, the Willey matter are an example of what unchecked power does to good people. Julie Hiatt Steele's daughter's boyfriend was questioned before the grand jury about whether she (sic) ever had sex with Mrs. Steele. How much worse does this get?" *Id.* In *U.S. Senate Committee on Governmental Affairs Holds Hearing on the Independent Counsel Act*, FED. DOC. CLEARING HOUSE, Apr. 14, 1999, Senator Specter testified:

One of the objections which was raised, and I do not know the factual basis, is that an immunity grant had been given without counsel being present and it was not in conformity with Department of Justice rules. . . . And I'm not saying you were wrong, but I'm trying to address their concerns, or what other independent counsel has done

Id.

126. 28 U.S.C. § 594(f)(1) (1994) provides:

An independent counsel shall, *except to the extent that to do so would be inconsistent with the purposes of this chapter*, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies . . . the independent counsel shall, *except to the extent that doing so would be inconsistent with the purposes of this chapter*, consult with the Department of Justice.

Id. (emphasis added). *See also supra* notes 34, 59, 84 and accompanying text.

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lution. Rather, via amendments to the statute, independent counsel conduct can be effectively regulated and subjected to the policies of the Justice Department.

To achieve this objective, independent counsels should be required to adhere to the following two-pronged procedure. First, whenever an independent counsel seeks to pursue a pre-trial, plea, or post-trial strategy which is regulated by the United States Attorneys' Manual, the independent counsel must report to, consult with, or obtain approval from a designated Department of Justice official prior to embarking upon the endeavor.¹²⁷ If the Department of Justice approves the proposed course of action, the independent counsel may then proceed. If, however, approval is not received, the independent counsel has a second option. This alternative, which may only be pursued upon satisfaction of the first prong, permits an independent counsel to present her pretrial, plea, or post-trial request to the division of the court. The Department of Justice will, of course, be permitted to present arguments in opposition. If authorization is received from the court, the independent counsel may pursue the requested conduct.¹²⁸

There are several distinct advantages to this proposal. First, it restrains the unbridled pursuit of questionable prosecutorial strategies. By mandating compliance with the United States Attorneys' Manual, and thus consultation with the Department of Justice, an independent counsel will be disinclined to pursue legal practices disfavored by the Department. In or-

127. I am not suggesting that an independent counsel be subject to every regulation contained within the United States Attorneys' Manual. Instead, only those provisions consistent with *Morrison v. Olson* should be made applicable. For a general overview of the United States Attorneys' Manual, including discussion of its underlying purpose, see *infra* note 149 and accompanying text. For a more detailed discussion of this proposal and its constitutionality, see *infra* notes 130-234 and accompanying text.

128. I have also proposed additional modifications to the statute which will, inter alia, more effectively regulate independent counsel conduct and improve appearances of propriety with respect to the selection of independent counsels and the prosecutorial process. For detailed descriptions of these proposals and the underlying rationales, see Cook, *supra* note 10, at 333-36 (Cook recommended that the division of the court "be increased from three to five judges, with two of the positions reserved for judges who have been appointed by presidents belonging to the incumbent's political party. The remaining three positions should be filled by judges appointed by presidents from the opposing political party. I also propose a unanimity requirement among the [division of the court] judges with respect to the selection of an independent counsel"; that independent counsels be subjected to fixed expenditure limits; and that an independent counsel seeking to extend his investigation be required to apply annually to the division of the court.).

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der to limit monetary and prosecutorial inefficiency costs, the proposal provides an incentive to engage in only those strategic ventures that will promote, rather than hinder, investigative efficacy. An independent counsel who surmises that a questionable legal strategy is likely to be resisted by the Department of Justice will be disinclined to sacrifice prosecutorial efficiency in order to engage in a protracted appeal before the division of the court.

The proposal also guards against Department of Justice infringement upon an independent counsel investigation. The suggested measure disallows Attorney General initiated review of independent counsel activity as well as veto authority of proposed prosecutorial strategies. Instead, if so pursued, the division of the court would adjudicate any unresolved disputes between the Department of Justice and the independent counsel. By preserving independent counsel autonomy, the proposal thus carefully avoids the inherent conflict of interest and appearance pitfalls inextricably associated with a return of prosecutorial functions to the Attorney General.

Finally, the proposal would entail only minimal economic costs. In all, only twenty independent counsel investigations have been commenced.¹²⁹ Given such, the Justice Department and the division of the court would likely incur only minimal added economic and workload costs. This cost is further minimized with respect to the division of the court. As noted, the division of the court has no authority under the proposal to initiate a review of independent counsel activity. Only if the independent counsel decides to pursue division of the court review does the court incur the costs pursuant to this proposal.

Aside from these benefits, however, critics of the statute will undoubtedly challenge the measure's constitutionality. Any proposal that positively affects the duties and responsibilities of the Special Division will be greeted, at a minimum, with great reservation. However, a review of the proposal in light of the Supreme Court case which upheld the constitutionality of the statute, *Morrison v. Olson*,¹³⁰ will demonstrate that the proposal, rather than offering radical change, is a constitutionally sound and measured response to the public and individual

129. Of the 20 independent counsel investigations, 11 have concluded without a returned indictment. See Todd S. Purdum, *Former Special Counsels See Need to Alter Law That Created Them*, N.Y. TIMES, Aug. 11, 1998, at A1.

130. 487 U.S. 654, 696-97 (1988).

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need to ensure fairness and appearances of propriety and to guard against the aberrant exercise of independent counsel discretion.

A. *Morrison v. Olson*

The *Morrison* case emanated from a dispute between the House of Representatives and the Environmental Protection Agency (EPA), with respect to the latter's limited responsiveness to House subpoenas requesting the production of certain documents.¹³¹ In 1982, the House of Representatives was investigating the enforcement by the EPA and the Land and Natural Resources Division of the Department of Justice of the "Superfund Law."¹³² Pursuant to this investigation, two House subcommittees issued subpoenas to the EPA, requesting the production of certain documents. The EPA, acting on orders from President Ronald Reagan, invoked executive privilege and refused to turn over the documents.¹³³ After the EPA Administrator was held in contempt, and a lawsuit was filed by the EPA and the United States against the House, the parties reached a compromise which allowed the House "limited access to the documents."¹³⁴

In 1983, the House Judiciary Committee held hearings to ascertain the role of the Justice Department in the aforesaid dispute.¹³⁵ Among those who testified before a House subcommittee was Theodore B. Olson, Assistant Attorney General for

131. See *id.* at 665. See also Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 AM. U. L. REV. 255, 257 (1989).

132. See *Morrison*, 487 U.S. at 665 (explaining that the purpose underlying the "Superfund Law" was the cleanup of toxic waste); HARRIGER, *supra* note 48, at 95.

133. See *Morrison*, 487 U.S. at 665. It was the EPA's contention that the documents "contained 'enforcement sensitive information.'" *Id.*

134. *Id.*

135. Earl Dudley, Deputy to eventual Independent Counsel Alexia Morrison, described the tense political battle which preceded their investigation:

[O]ur investigation was focused on allegations that an earlier investigation of the EPA documents affair by the House Judiciary Committee—an investigation called for by the Speaker of the House and several House committee chairmen—had been obstructed by officials at the highest levels of the Reagan Justice Department. Particularly under Attorney General Meese, the Justice Department was the *bête noir* of Democrats in general and congressional Democrats in particular, and the Department had deeply offended House Members on both sides of the aisle by suing the House of Representatives in the name of "the United States" in an effort to forestall a contempt prosecution of the Administrator of the EPA for withholding the disputed documents.

Dudley, *supra* note 131, at 257.

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the Office of Legal Counsel.¹³⁶ Two years later, the House issued a report detailing its investigation which, *inter alia*, intimated that Olson had lied during his testimony.¹³⁷ The report further suggested that both Edward C. Schmults, Deputy Attorney General, and Carol E. Dinkins, Assistant Attorney General for the Land and Natural Resources Division, had obstructed the House's investigation by illegally withholding requested documents.¹³⁸

Pursuant to a House request for the appointment of an independent counsel, the Public Integrity Section was requested by the Attorney General to conduct a preliminary investigation.¹³⁹ Despite the Section's ultimate recommendation that an independent counsel be appointed to investigate Olson, Schmults, and Dinkins,¹⁴⁰ the Attorney General disregarded this advice and requested "the appointment of an independent counsel solely with respect to Olson."¹⁴¹

James C. McKay was the original independent counsel named by the division of the court. However, due to a conflict of interest, he relinquished the post one month after his appointment, and was replaced by his chief deputy, Alexia Morrison.¹⁴² Morrison was given jurisdiction to determine

"whether the testimony of . . . Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law." The court also ordered that the independent counsel

shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected

136. *See Morrison*, 487 U.S. at 665-66.

137. *See id.* at 666. The report was issued on December 5, 1985, and was approximately 3000 pages. *See HARRIGER*, *supra* note 48, at 96.

138. *See Morrison*, 487 U.S. at 666.

139. *See id.*

140. Professor Harriger observes that the report suggested that all three should be subject to the investigation because the case appeared to involve "a seamless web of events" that could not be adequately investigated in isolation. It concluded that any effort to separate the allegations and individuals out would be "artificial" and "may impede the independent counsel's ability to fully explore the allegations."

HARRIGER, *supra* note 48, at 96.

141. *Morrison*, 487 U.S. at 666.

142. *See id.* at 667; *HARRIGER*, *supra* note 48, at 96.

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with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation. . . .¹⁴³

During the course of her investigation, however, Morrison sought to have the matters involving Schmuts and Dinkins referred to her as “related matters.”¹⁴⁴ The Special Division refused, concluding that the Attorney General’s decision was unreviewable. Nonetheless, the court construed its original jurisdictional grant as authorizing Morrison to investigate whether Olson, Schmuts, and Dinkins conspired to obstruct the congressional inquiry.¹⁴⁵ Thereafter, Morrison issued grand jury subpoenas to Olson, Schmuts, and Dinkins, who, in turn, moved to quash on the grounds that, *inter alia*, the independent counsel statute was unconstitutional.¹⁴⁶ The district court upheld the statute’s constitutionality but was later reversed by the District of Columbia Circuit Court of Appeals.¹⁴⁷ In reversing the D.C. Circuit, the Supreme Court found, *inter alia*, that the authority vested in the division of the court to appoint an independent counsel did not violate the appointments clause; that Article III was not violated given that the powers assigned to the division of the court were either analogous to functions performed by the judiciary or amounted to, at most, a *de minimis* intrusion upon the Executive Branch; and that the statute did not violate principles of separation of powers.¹⁴⁸

Unlike independent counsels, the pretrial, post-trial, and plea practices of United States Attorneys and Assistant United States Attorneys are largely regulated by the United States Attorneys’ Manual. The purpose of the Manual is to ensure the impartial exercise of investigative and prosecutorial strategies and policies across the country by Department prosecutors. As stated by former United States Attorney and Whitewater Independent Counsel Robert Fiske:

As United States Attorney for the Southern District of New York, I was part of the Department of Justice, headed, of course, by the Attorney General in Washington, and there is a

143. *Morrison*, 487 U.S. at 667 (citation omitted).

144. *Id.*

145. *See id.* at 668.

146. *See id.*

147. *See id.*

148. *See id.* at 670-97.

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whole system of review procedures in place that control what Assistant U.S. Attorneys or United States Attorneys can do in the investigation and prosecution of criminal cases. You can't take certain kinds of investigative steps, like subpoenaing members of the media. You can't bring certain kinds of cases, such as racketeering cases, without getting the approval of career people in the Justice Department. And the whole purpose of that is so that there can be a uniform, cohesive system of law enforcement throughout the United States, with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general.¹⁴⁹

As detailed in the above statutory chronology, Congress has *thrice* constructed the language of § 594(f) in an attempt to mandate independent counsel compliance with Department of Justice policies, yet respect the independence necessary to ensure the actual and apparent impartial exercise of prosecutorial discretion.¹⁵⁰ In the minds of many, including this author, the attempt to balance these objectives has, thus far, proved unsuccessful.¹⁵¹

I submit, however, that my proposal, requiring Attorney General approval, with an option for review by the division of the court whenever certain provisions of the United States Attorneys' Manual are implicated, effectively addresses this ongoing congressional effort to regulate independent counsel discretion. By requiring Attorney General consultation, this proposal mandates actual compliance with Department of Justice policies and further preserves the appearance of propriety by permitting the independent counsel to seek refuge in the division of the court from an adverse departmental determination. Thus, the inherent conflicts associated with Attorney General control over Executive Branch prosecutions are avoided, while prosecutorial independence is preserved. Moreover, as the following discussion amply illustrates, when reviewed in light of the *Morrison* case, the proposal is constitutionally sound, as well.

149. Conference, *supra* note 123, at 1546.

150. See *supra* notes 34, 59, and 84 and accompanying text.

151. See *supra* note 126 and accompanying text.

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*B. Pretrial Practices**1. Personal conversations*

An appropriate place to begin this critique is through a review of the succession of regulations that govern prosecutorial behavior with respect to the interception of personal communications. For example, Department approval is required prior to a prosecutor applying for, or seeking an extension of, a court order “authorizing the interception of wire, oral and/or electronic communications”;¹⁵² prior to intercepting roving wire and oral communications;¹⁵³ for emergency interceptions under 18 U.S.C. § 2518(7) without a court order;¹⁵⁴ to employ video surveillance “when there is a constitutionally protected expectation of privacy requiring judicial authorization”;¹⁵⁵ and to inter-

152. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 123, § 9-7.110. This section provides:

[T]he Electronic Surveillance Unit of the Criminal Division’s Office of Enforcement Operations will conduct the initial review of the necessary pleadings, which include:

A. The affidavit of an “investigative or law enforcement officer” of the United States, . . . with such affidavit setting forth the facts of the investigation that establish the basis for those probable cause (and other) statements required by Title III to be included in the application;

B. The application by any United States Attorney or his/her Assistant, . . . that provides the basis for the court’s jurisdiction to sign an order authorizing the requested interception of wire, oral, and/or electronic communications; and

C. A set of orders to be signed by the court authorizing the government to intercept, or approving the interception of, the wire, oral and/or electronic communications that are the subject of the application. . . .

Id.

153. *See id.* § 9-7.111. This section reads, “Pursuant to 18 U.S.C. § 2518 (11)(a) and (b), the government may obtain authorization to intercept wire, oral, and electronic communications of specifically named subjects without specifying with particularity the premises within, or the facilities over which, the communications will be intercepted.” *Id.*

154. *See id.* § 9-7.112. This regulation states:

Title III contains a provision which allows for the warrantless, emergency interception of wire, oral, and/or electronic communications. . . . As defined by 18 U.S.C. § 2518 (7), an emergency situation involves either: (1) immediate danger of death or serious bodily injury to any person; (2) conspiratorial activities threatening the national security interest; or (3) conspiratorial activities characteristic of organized crime. . . . Once the AG, the DAG, or the AssocAG authorizes the law enforcement agency to proceed with the emergency Title III, the government then has forty-eight (48) hours, from the time the authorization was granted, to obtain a court order approving the emergency interception. 18 U.S.C. § 2518 (7).

Id.

155. *Id.* § 9-7.200. This section provides:

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cept nontelephonic verbal communications when less than all the parties are consenting to the interception, when the interception pertains to congressional members, federal judges, and certain members of the Executive Branch, among others, for certain specified offenses.¹⁵⁶

Recognizing that Article III of the Constitution restricts federal judicial authority to “Cases” and “Controversies,”¹⁵⁷ and that nonjudicial executive or administrative duties may not be imposed upon the judiciary,¹⁵⁸ the majority in *Morrison*, nonetheless, held that the independent counsel statute did not violate these limitations. In so finding, the Court initially noted the two-fold rationale attendant to these limitations; namely, “to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches.”¹⁵⁹ Indeed, these rationales would underlie much of the Court’s Article III analysis.

At various points in its opinion, the Court identified, grouped, and critiqued under Article III certain powers granted via the statute to the division of the court.¹⁶⁰ In each instance, the bestowed responsibilities withstood constitutional scrutiny. Of particular note was the Court’s review of those delegated powers that “do require the court to exercise some judgment

[C]ertain officials of the Criminal Division have been delegated authority to review requests to use video surveillance for law enforcement purposes when there is a constitutionally protected expectation of privacy requiring judicial authorization. . . . When court authorization for video surveillance is deemed necessary, it should be obtained by way of an application and order predicated on Fed. R. Crim. P. 41(b) and the All Writs Act (28 U.S.C. § 1651).

Id.

156. *See id.* § 9-7.302.

157. U.S. CONST. art. III, § 2.

158. *See Morrison v. Olson*, 487 U.S. 654, 677 (1988).

159. *Id.* at 678.

160. The Court detailed the following duties:

These duties include granting extensions for the Attorney General’s preliminary investigation; receiving the report of the Attorney General at the conclusion of his preliminary investigation; referring matters to the counsel upon request; receiving reports from the counsel regarding expenses incurred; receiving a report from the Attorney General following the removal of an independent counsel; granting attorney’s fees upon request to individuals who were investigated but not indicted by an independent counsel; receiving a final report from the counsel; deciding whether to release the counsel’s final report to Congress or the public and determining whether any protective orders should be issued; and terminating an independent counsel when his or her task is completed.

Id. at 680 (citations omitted).

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and discretion.”¹⁶¹ Characterizing the duties assigned as “directly analogous to functions that federal judges perform in other contexts,” the Court expounded upon this claim by providing several concrete examples of its logic.¹⁶² Among the comparisons drawn was the authority of the federal courts to review applications for wiretaps, which the Supreme Court observed “may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an ex parte proceeding.”¹⁶³

Title 18, United States Code § 2516, the federal statute which authorizes this judicial approval and oversight authority with respect to communicative interceptions, provides, in pertinent part:

(1) The Attorney General, Deputy Attorney General [among several other Department of Justice officials], may authorize *an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with § 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . .*¹⁶⁴

Section 2518 further expounds upon this judicial authority:

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. . . . *Extensions of an order may be granted, but only upon application for an extension . . . and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days.*¹⁶⁵

Hence, pursuant to these statutes, a federal judge may, *inter alia*, authorize, extend, and terminate the government’s utilization of electronic eavesdropping. Indeed, privacy concerns underlie this judicial role. It is well recognized that governmental interception of personal conversations can implicate

161. *Id.* at 681.

162. *Id.*

163. *Id.* at 681-82 n.20.

164. 18 U.S.C. § 2516(1) (1999) (emphasis added).

165. *Id.* § 2518(5) (emphasis added).

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an individual's Fourth Amendment privacy rights.¹⁶⁶ Given such, it is incumbent upon the judiciary to screen governmental activity that potentially infringes constitutional protections. Thus, through the review of government wiretap and other related applications, the courts can assess the merits underlying such governmental requests and necessarily preempt undue governmental interference with individual constitutional liberties. Moreover, by monitoring previously approved governmental interceptions, the courts necessarily guard against subsequent infringements of Fourth Amendment rights.

Sections 9-7.110, 9-7.111, 9-7.112, 9-7.200, and 9-7.302 of the United States Attorneys' Manual fall squarely within this province of judicial activity. All pertain to the interception of verbal communications or visual conduct, and, with the exception of section 9-7.302, expressly reference the authority of the federal courts with respect to such matters.¹⁶⁷ Moreover, all, either potentially or in fact, implicate Fourth Amendment interests. The division of the court, upon independent counsel request, would simply be required, under my proposal, to review and render a decision with respect to the propriety of proposed governmental interceptions of verbal and visual communications. Nothing more is required. Hence, the contemplated judicial functions are perfectly congruous with the judicial review authority cited with approval in *Morrison*.

2. Grand jury

As with wiretaps, a Department prosecutor's grand jury-related activity is similarly subject to a vast array of regulations. For example, before a grand jury subpoena can be served upon a target of an investigation, the United States Attorneys' Manual mandates that prior approval be obtained from either

166. See *Katz v. United States*, 389 U.S. 347 (1967).

167. See *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993) (reviewing propriety of government's application to the district court for an order authorizing a warrant to engage in roving electronic surveillance); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992) (finding that government's application with the district court for an order authorizing the use of video surveillance was proper); *United States v. Bailin*, No. 89 CR 668, 1990 WL 16437 (N.D. Ill. Feb. 2, 1990) (holding that government was not required to seek judicial approval prior to engaging in the interception of oral communications where communication at issue did not implicate a Fourth Amendment interest); *United States v. Crouch*, 666 F. Supp. 1414 (N.D. Cal. 1987) (finding that no emergency existed which justified interception of telephone conversations absent judicial approval).

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the United States Attorney or the Assistant Attorney General.¹⁶⁸ Similarly, approval must also precede the resubpoenaing of a contumacious witness before successive grand juries, as well as the pursuit of civil contempt sanctions against the witness,¹⁶⁹ the requesting of judicial permission to release grand jury materials to state and local law enforcement officials,¹⁷⁰ and the impaneling of a special grand jury pursuant to 18 U.S.C. § 3331(a).¹⁷¹

Finally, there are a series of regulations pertinent to the initiation of grand jury reports. For instance, section 9-11.330 requires that notification be provided when a § 3331(a) "special grand jury will be considering the issuance of a report" or will be preparing a report which was not requested by the United States Attorney.¹⁷² Likewise, approval must be obtained before a draft special grand jury report may be submitted to a § 3331(a) special grand jury,¹⁷³ and consultation is required before any regular or special grand jury report may be initiated.¹⁷⁴

In its Article III analysis, the Supreme Court further analogized the judicial function under the statute to the judicial role with respect to the grand jury. The Court observed that, pursuant to Federal Rule of Criminal Procedure 6(e), the

168. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-11.150. This section reads, in part:

However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (citation omitted) is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target's voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena.

Id.

169. See *id.* § 9-11.160. This regulation provides, in pertinent part:

Prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to resubpoena a witness before the successive grand jury as well as to seek civil contempt sanctions should the witness persist in his or her refusal to testify. To obtain approval, the prosecutor must show either : (a) that the witness is prepared to testify; or (b) that the appearance of the witness is justified since the witness possesses information essential to the investigation.

Id.

170. See *id.* § 9-11.260.

171. See *id.* § 9-11.300.

172. *Id.* § 9-11.330.

173. See *id.*

174. See *id.* § 9-11.101.

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federal judiciary was empowered to determine whether grand jury matters could be disclosed and whether a grand jury investigation could be extended.¹⁷⁵ It was also noted that the courts “have traditionally supervised grand juries and assisted in their ‘investigative function’ by, if necessary, compelling the testimony of witnesses.”¹⁷⁶

Each of the cited provisions of the United States Attorneys’ Manual directly corresponds to these judicial grand jury activities. As noted, the federal judiciary is charged with manifold duties with respect to the grand jury, including compelling testimonial evidence. Thus, whenever a witness challenges the service or issuance of a subpoena, it is the judiciary that must adjudicate the dispute.¹⁷⁷ Indeed, it was this type of dispute—a subpoena challenge—that inspired *Morrison v. Olson*.¹⁷⁸

The conduct contemplated in sections 9-11.150 (targets) and 9-11.160 (contumacious witnesses) is plainly analogous to this judicial function. Each is concerned with the service and issuance of grand jury subpoenas to classified individuals, each necessitates judicial resolution in the event of a dispute, and each explicitly acknowledges the inextricable judicial role associated with such endeavors.¹⁷⁹ Section 9-11.150, for example, cites to

175. See *Morrison v. Olson*, 487 U.S. 654, 681 (1988).

176. *Id.* at 681 n.20 (citing *Brown v. United States*, 359 U.S. 41, 49 (1959) (“A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court’s aid, because powerless itself to compel the testimony of witnesses. It is the court’s process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.”)).

177. See *United States v. Doe*, 541 F.2d 490 (5th Cir. 1976) (refusing to quash subpoena requiring witness to appear before grand jury on account of alleged animosity between the prosecutor and the witness); *In re Grand Jury Subpoena Duces Tecum Served Upon PHE, Inc.*, 790 F. Supp. 1310 (W.D. Ky. 1992) (rejecting claim that grand jury subpoena should be quashed on grounds that it was overly broad, unreasonable and irrelevant to the grand jury’s investigation); *In re Grand Jury Investigation*, 557 F. Supp. 1053 (E.D. Pa. 1983) (finding that grand jury subpoena should not be suppressed on account of either attorney-client or work-product privileges); *In re 1979 Grand Jury Subpoena*, 478 F. Supp. 59 (M.D. La. 1979) (holding that subpoena should not be quashed on jurisdictional grounds; quashing subpoena duces tecum due to vagueness and possible overly broad scope).

178. See *supra* notes 130-48 and accompanying text.

179. See *supra* notes 168-69 and accompanying text. Section 9-11.160 also makes reference to *Shillitani v. United States*, 384 U.S. 364, 371 n.8 (1963), which recognizes the authority of a court to compel a contumacious witness to comply with grand jury subpoena through its civil and criminal contempt powers. Section 9-11.160’s requirement that departmental approval be obtained prior to the seeking of contempt sanctions is analogous to this judicial contempt authority. See UNITED STATES ATTORNEYS’ MANUAL, *supra* note 123, § 9-11.160.

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several cases that address challenges to the issuance of grand jury subpoenas to investigative targets. One such case is *United States v. Wong*.¹⁸⁰ At issue was Wong's claim that the government violated her Fifth Amendment due process rights when it failed to inform her that she had a right to remain silent when she, as a target of a criminal investigation, appeared before a grand jury pursuant to a subpoena.¹⁸¹ Finding no abridgement of Wong's Fifth Amendment rights, the Court observed, *inter alia*, that the Fifth Amendment did not protect perjury and that there was no "unfairness" in summoning potential defendants to testify before the grand jury.¹⁸²

The release of federal grand jury materials to state or local authorities¹⁸³ also has a judicial analogue, which is found in Federal Rule of Criminal Procedure 6(e)(3)(C)(iv). That rule, which requires judicial approval prior to the release of such information, provides, in pertinent part:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

....

(iv) *when permitted by a court* at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.¹⁸⁴

Thus, the rule's plain language contemplates an inseparable association between a prosecutorial request to release such information and a judicial assessment of that request. Moreover, the rule further empowers the court to establish the terms pur-

180. 431 U.S. 174 (1977).

181. *See id.* at 175. Wong was later indicted for rendering perjurious testimony before the grand jury. *See id.* at 176.

182. *See id.* at 179.

183. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-11.260 (requiring Department of Justice approval prior to seeking judicial authority to share grand jury information with state or local authorities).

184. FED. R. CRIM. P. 6(e)(3)(C)(iv) (emphasis added).

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suant to which the information may be disseminated.

The remaining provisions cited with respect to grand jury activity are similarly consonant with recognized judicial activity. Sections 9-11.300, 9-11.330, and 9-11.101, which pertain to the impaneling of special grand juries and the preparation of grand jury reports, conform to the judicial grand jury oversight function cited approvingly in *Morrison*. Title 18, United States Code § 3331, which is cited directly or is referenced by each of the aforementioned provisions, authorizes federal courts to impanel and extend the service of special grand juries.

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General [or other Department of Justice officials] certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. . . . If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months.¹⁸⁵

Moreover, 18 U.S.C. § 3333 authorizes the federal judiciary to “examine” and “accept” reports submitted by a special grand jury.¹⁸⁶

The above authority and application plainly evinces the parallelism that exists between current judicial grand jury activities and the judicial conduct proffered pursuant to my proposal. Every cited grand jury regulation has an irrefutable counterpart in an existing judicial function. Given such, the division of the court would, if requested, engage in judicial review activity with unambiguous analogues to judicial grand jury functions.

3. Search warrants

Prosecutorial discretion with respect to the utilization of search warrants is, similarly, subject to the regulations prom-

185. 18 U.S.C. § 3331(a) (Supp. I 1977).

186. *Id.* § 3333(b).

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ulgated in the Manual. For example, a prosecutor must secure Department of Justice approval before applying for a warrant to search an attorney's office,¹⁸⁷ as well as for any of the following tangible items: documentary materials in the possession of third party "physician[s], lawyer[s], or clergyman[s]";¹⁸⁸ work product materials or other documents belonging to individuals "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication[s]";¹⁸⁹ and evidence of certain criminal tax offenses.¹⁹⁰

It is axiomatic that the Fourth Amendment affords protection to the individual "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁹¹ As a general matter, this Fourth Amendment right is preserved by an independent judicial official who is empowered to issue the warrants to search.¹⁹² In determining whether a warrant will issue, the judicial officer will review affidavits, in addition to any supporting testimonial evidence that may be required.¹⁹³

The searches described in sections 9-13.420, 9-19.220, 9-19.240, and 9-19.600 fall precisely within these confines: all implicate Fourth Amendment interests; all require the submission of a search warrant application to a judicial officer; and all necessitate a judicial finding of probable cause prior to execution.¹⁹⁴ Notably, when equating judicial duties under the statute with preexisting judicial functions, the majority in *Morri-*

187. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-13.420.

188. *Id.* § 9-19.220.

189. *Id.* § 9-19.240.

190. See *id.* § 9-19.600.

191. U.S. CONST. amend. IV.

192. See *California v. Carney*, 471 U.S. 386, 390 (1985).

193. See FED. R. CRIM. P. 41 (c)(1).

194. See *Klitzman v. Krut*, 744 F.2d 955 (3d Cir. 1984) (granting preliminary injunction with respect to search warrant which led to the seizure of documentary materials in the possession of a disinterested third person); *United States v. Hunter*, 13 F. Supp. 2d 574 (D. Vt. 1998) (finding that probable cause existed for the issuance of a warrant to search an attorney's office); *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432 (W.D. Tex. 1993) (holding that Secret Service's seizure of work product materials pursuant to a search warrant violated the Privacy Act of 1980).

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son cited approvingly to the authority of the federal courts to issue search warrants. As with applications to engage in electronic interception, the Court observed that the review of search warrants “may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an ex parte proceeding.”¹⁹⁵

The judicial duties contemplated pursuant to my proposal require nothing different. Upon request of an independent counsel, the division of the court would be required to consider the nature and scope of a criminal investigation, as well as the evidence submitted in support of the alleged need for the warrant. Such conduct is perfectly consonant with their preexisting judicial function.

4. Trial subpoenas

The federal judiciary performs a similar function with respect to trial subpoenas. As with grand jury subpoenas, the judiciary must adjudge disputes that arise pursuant to challenges to trial subpoenas. In performing this function, the court must consider the content of the trial subpoena, as well as the facts accompanying its issuance.¹⁹⁶ *United States v. Crosland* is illustrative.¹⁹⁷

The case stemmed from a government search, conducted on October 2, 1992, of a residence leased by Maldonado Crosland which resulted in the seizure of, inter alia, approximately 50 grams of cocaine base, \$228,174 in United States currency, and other drug-related paraphernalia.¹⁹⁸ On October 22, 1992, a search incident to Crosland’s arrest resulted in the recovery of an additional \$29,301 in United States currency, as well as the seizure of Crosland’s automobile, a 1992 Nissan 300ZX.¹⁹⁹ In an effort to contest the forfeiture of his automobile, Crosland filed,

195. *Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988).

196. See *In re Grand Jury Subpoena Duces Tecum Served Upon PHE, Inc.*, 790 F. Supp. 1310 (W.D. Ky. 1992) (rejecting claim that subpoena seeking certain business records and documents was both overbroad and irrelevant); *In re Grand Jury Investigation*, 557 F. Supp. 1053 (E.D. Pa. 1983) (denying motions to quash on the asserted grounds that the subpoenas violated attorney-client and work-product privileges); *In re 1979 Grand Jury Subpoena*, 478 F. Supp. 59 (M.D. La. 1979) (rejecting argument that grand jury subpoena should be quashed on jurisdictional grounds and granting motion to quash subpoena duces tecum on account of vagueness).

197. See *United States v. Crosland*, 821 F. Supp. 1123 (E.D. Va. 1993).

198. See *id.* at 1125.

199. See *id.*

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on February 2, 1993, an affidavit with the Drug Enforcement Administration which declared that his current financial assets consisted of \$60 in cash and that he had only earned \$20,000 to \$30,000 during the preceding twelve-month period.²⁰⁰ On February 23, 1993, the day after having learned of the affidavit, the government served a grand jury subpoena duces tecum on the law firm that was representing Crosland—Joseph, Greenwald & Laake, P.A.²⁰¹ The subpoena sought the production of “[a]ny and all documents and records concerning the payment of any moneys by, or on behalf of, Maldonada Crosland during the period September 1, 1992, to the present, including, but not limited to, receipts, fee records, bank deposits and monetary instruments.”²⁰² Before the firm had adequate opportunity to respond, however, a seven-count indictment was returned against Crosland, charging him with various narcotic-related offenses.²⁰³

After a judicial hearing on a motion to quash, but prior to the issuance of the court’s ruling, the government served upon the law firm a trial subpoena duces tecum, seeking the same information contained in the grand jury request.²⁰⁴ Again, the law firm moved to quash.²⁰⁵ In granting the motion, the court observed that, unlike a grand jury subpoena, a trial subpoena must satisfy three criteria—relevancy, admissibility, and specificity—and that the subject subpoena lacked sufficient specificity.²⁰⁶

The specificity requirement announced in [*United States v. Nixon*] is designed to ensure that the use of trial subpoenas is limited to securing the presence at trial of particular documents or sharply defined categories of documents. . . . The fact that the government does not know who paid Crosland’s attorney’s fees, and is seeking to determine this information by means of a subpoena, points persuasively to the conclusion that this trial subpoena is an impermissible “fishing expedition,” not a proper request for production of specifically identified documents. . . . Because there is no way to determine

200. *See id.*

201. *See id.*

202. *Id.*

203. *See id.*

204. *See id.* at 1126.

205. *See id.*

206. *See id.* at 1128.

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whether the requested documents would in fact produce evidence related to the pending charges, the trial subpoena in question must be quashed as insufficiently specific.²⁰⁷

Discussion of this case is apt not only for its demonstrative value with respect to judicial involvement in subpoena disputes, but also for its interrelation with the United States Attorneys' Manual. Section 9-13.410—Guidelines for Issuing Grand Jury or Trial Subpoenas to Attorneys for Information Relating to the Representation of Clients—mandates that an attorney seeking such information via a trial subpoena first obtain departmental consent.²⁰⁸ In light of the information sought, the government prosecutor in *Crosland* undoubtedly was required to comply with this provision prior to the subpoena's issuance. In fact, the regulation expressly provides that the Department greatly scrutinizes such requests, given "the potential effects upon an attorney-client relationship that may result from the issuance" of such trial subpoenas.²⁰⁹

To require the division of the court, upon independent counsel request, to review the propriety of issuing a trial subpoena pursuant to section 9-13.410 is directly analogous to this preexisting judicial function. As in *Crosland*, the division of the court would review the subpoena, as well as the facts accompanying the request, before making a determination whether the subpoena should issue.

The same rationale applies equally to other regulations in the Manual pertinent to the issuance of subpoenas. Departmental approval is required, for example, before a subpoena may issue to a member of the news media, or before toll records may be obtained from such members.²¹⁰ Similarly, the Department must consent to the issuance of "any subpoenas to persons or entities in the United States for records located abroad," and to the service of "a subpoena ad testificandum on an officer of, or attorney for, a foreign bank or corporation who is temporarily in or passing through the United States when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation."²¹¹

207. *Id.* at 1129.

208. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-13.410.

209. *Id.*

210. *See id.* § 9-13.400.

211. *Id.* § 9-13.525.

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C. Post-trial Practices

Though the aforementioned sections represent only a sampling of the multitude of pretrial regulations that govern United States Attorney conduct,²¹² there are, in addition, a host of regulations that govern a prosecutor's post-trial practices.

1. Plea procedures

Illustrative of such regulations are those pertaining to plea agreements. The Manual mandates, for example, that the Assistant Attorney General, Criminal Division be notified when entering into a plea arrangement in a death penalty case.²¹³ Approval is also requisite for pleas of *nolo contendere*,²¹⁴ Alford pleas,²¹⁵ multi-district (global) pleas,²¹⁶ and pleas with congressional members or federal judges.²¹⁷ Moreover, as a general practice, before entering into any type of plea agreement, the prosecutor must consult with the investigating agency, as well as any victims.²¹⁸ Relatedly, approval must also be secured prior to dismissing readily provable charges, as well as before filing downward departure motions.²¹⁹

212. The following listing denotes some of the additional pretrial regulations that satisfy the constitutional mandates of *Morrison*: United States Attorneys' Manual section 9-2.181 (requiring that approval be obtained in Organized Crime Strike Force matters for various activities, including court authorized electronic surveillance, witness immunities, and plea agreements); section 9-5.150 (requiring approval prior to seeking the closure of judicial proceedings); section 9-23.130 (requiring authorization prior to requesting immunity); section 9-23.400 (requiring approval before initiating or recommending that an immunized person be prosecuted for an offense emanating from evidence obtained pursuant to an immunity grant); Criminal Resource Manual section 2084 (requiring prior approval to seek a restraining order in a RICO case); United States Attorneys' Manual section 9-112.110 (requiring Department authorization prior to seeking "the judicial forfeiture of property that would not otherwise be forfeited administratively in cases that are not covered by the exception for compelling prosecutorial considerations or the exception for aggregation of seized property"); section 9-112.220 (requiring prior approval for "denial by seizing agency of in forma pauperis petition"); section 9-112.240 (requiring approval before a "pre-indictment ex parte application [may be submitted] for a Temporary Restraining Order in a criminal forfeiture case").

213. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-10.100.

214. See *id.* § 9-16.010.

215. See *id.* § 9-16.015.

216. See *id.* § 9-27.641.

217. See *id.* § 9-16.110.

218. See *id.* § 9-16.030. Consultation is also required before agreeing to return property otherwise subject to forfeiture. See *id.* § 9-113.103.

219. See *id.* § 9-16.030.

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The judicial role with respect to the acceptance of pleas is well established. Rule 11 of the Federal Rules of Criminal Procedure explicitly provides that it is the duty of the court to accept or reject a proposed guilty plea as well as any dispositive arrangements subsequently entered into between the government and the defendant. The pertinent aspects of Federal Rule of Criminal Procedure 11 provide:

(a) Alternatives

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

. . . .

(e) Plea Agreement Procedure.

. . . .

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.²²⁰

Rule 11 also requires judicial approval prior to the dismissal of criminal charges.²²¹ The court must further inform the defen-

220. FED. R. CRIM. P. 11 (a)(1) and (2), (b), and (e)(2). *See also* North Carolina v. Alford, 400 U.S. 25 (1970) (holding that the trial court did not err when, in possible death penalty case, the court accepted a plea of guilty where the state had strong evidence of his guilt and the defendant maintained his innocence); United States v. Rivera, 25 F. Supp. 2d 167, 168 n.1 (S.D.N.Y. 1998) (recognizing that Rivera's codefendants had earlier entered into a global plea agreement with the government).

221. *See* FED. R. CRIM. P. 11 (e)(1)(A).

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dant that, in imposing sentence, it must follow the Sentencing Guidelines, if applicable, but that it may depart (upward or downward) from that sentencing range.²²²

Given this judicial role, it can scarcely be claimed that division of the court authority, as defined in my proposal, to endorse such plea and sentencing arrangements constitutes either an impermissible burden on Executive Branch authority or is inconsistent with the division of the court's existing judicial functions. Rather, such a function is consonant with long-standing judicial practice.

2. Appellate procedures

Similarly, there are several regulations that address a prosecutor's appellate practices. Section 9-2.170 provides, in pertinent part, that approval must be obtained for:

2. A petition for rehearing that suggests rehearing en banc—and any rare appeal in which the government wishes to suggest that it be heard initially en banc. *See* Fed. R. App. P. 35(c). Although a petition for panel rehearing does not require the approval of the Solicitor General, one should not be filed until the Solicitor General has been given the opportunity to decide whether the case merits en banc review.
3. A petition for mandamus or other extraordinary relief.
4. In a government appeal, a request that the case be assigned to a different district court judge on remand.
5. A request for recusal of a court of appeals judge.
6. A petition for certiorari [which may be filed only by the Solicitor General]²²³

Each of the delineated categories pertain to prosecutorial appellate processes that directly correspond to routine United States circuit court or Supreme Court practice. Federal appellate courts routinely decide whether petitions for rehearings or en banc reviews are granted,²²⁴ whether mandamus relief is

222. *See id.* at 11(c)(1).

223. UNITED STATES ATTORNEYS' MANUAL, *supra* note 123, § 9-2.170.

224. *See* FED. R. APP. P. 40 (detailing procedures with respect to petitions for panel rehearing); *id.* 35 (detailing procedures with respect to en banc determinations).

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warranted,²²⁵ whether a remand order will require the assignment of a different district court judge,²²⁶ and whether a circuit court judge should be recused from consideration of a matter.²²⁷ Likewise, the Supreme Court customarily determines whether to grant petitions for certiorari.²²⁸

To argue that the extension of such activities to the division of the court somehow unconstitutionally encroaches upon the Executive Branch function is simply an untenable notion. Rather than abridge Article III principles, the requirement of division of the court approval, if sought by the independent counsel, is consistent with the constitutional explication in *Morrison*. Each of the assigned duties satisfies the constitutional standard given their unmistakable relation to judicial appellate court practice.

V. CONCLUSION

This article has attempted, inter alia, to establish that the exercise of independent counsel discretion can be effectively governed through a process that mandates compliance with the United States Attorneys' Manual, satisfies the constitutional standards delineated in *Morrison*, and avoids the real and apparent conflicts of interests associated with internal Executive Branch investigations and prosecutions. By demonstrating the inextricable link between the highlighted provisions of the United States Attorneys' Manual and the judicial function, it has been demonstrated that the proposed measure is consistent with the requirements of Article III.

However, there is a supplementary argument that must be similarly presented and equally stressed. For this, too, constitutes yet another compelling Article III-based justification on behalf of the proposal's constitutionality. Among the delegated powers considered in *Morrison* was the authority of the Special

225. See *In re Sealed Case No. 98-3077* (D.C. Cir. 1998) (finding that independent counsel was entitled to mandamus relief).

226. See *United States v. Waskom*, 179 F.3d 303 (5th Cir. 1999) (holding that defendant was entitled to the recusal of sentencing judge and to be resentenced before a different district court judge).

227. See *In re Apex Oil Co.*, 981 F.2d 302 (8th Cir. 1992) (holding that recusal was not required of Eighth Circuit judge despite his former partnership in law firm that had represented Alaska fishermen).

228. See SUP. CT. R. 14 (detailing procedures with respect to petitions for writs of certiorari).

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Division, as defined in § 596(b)(2), to terminate the operations of an independent counsel. As observed by the Supreme Court, that section authorized the division of the court,

acting either on its own or on the suggestion of the Attorney General, [to] terminate the office of an independent counsel at any time if it finds that “the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.”²²⁹

The Court was unmistakably more troubled with this provision than with the others it had considered. It noted that the division’s termination authority, “especially when exercised by the division *on its own motion*, [was] ‘administrative’ ” in nature, in that the division was *mandated* to monitor independent counsel activity and determine whether his job was “completed.”²³⁰ The Court further observed that, unlike other provisions the Court had considered, § 596(b) was void of analogues with respect to judicial activity.²³¹ Despite these dual concerns, however, the Court upheld the section, finding that it did not constitute a “significant judicial encroachment upon executive power or upon the prosecutorial discretion of the independent counsel.”²³² Construing the provision narrowly, the Court permitted the division of the court to terminate an independent counsel’s activities only after determining that the counsel’s duties are

truly “completed” or “so substantially completed” that there remains no need for any continuing action by the independent counsel. It is basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division’s power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive’s authority to require that the Act be invalidated as inconsistent with Article III.²³³

229. *Morrison v. Olson*, 487 U.S. 654, 664 (1988) (quoting 28 U.S.C. § 596(b)(2) (1978)).

230. *Id.* at 682 (emphasis added).

231. *See id.*

232. *Id.*

233. *Id.* at 683.

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The concerns that occupied the Court with respect to § 596(b)(2)—the administrative nature of the function and the want of analogous judicial duties—are simply not present with respect to the instant proposal. First, unlike § 596(b)(2), my proposal does not require, or even permit, any monitoring by the division of the court of independent counsel activity. Second, the division is void of any authority to initiate any kind of review of contemplated independent counsel action. Only if the Department of Justice disapproves conduct proposed by an independent counsel does the independent counsel have the option to seek review before the division of the court. Division of the court review is entirely dependent upon the initiation of the process by the independent counsel. Moreover, as demonstrated above, when review is sought, it may only be sought with respect to those provisions in the United States Attorneys' Manual which are either directly analogous to functions performed by the judiciary or impose only a *de minimis* judicial imposition upon Executive Branch activity. Thus, the two aspects attendant to § 596(b)(2) which proved troubling to the Court are completely absent here.²³⁴

My proposal to control the exercise of independent counsel discretion is, I submit, constitutionally sound and imposes few, if any, meaningful efficiency costs. The benefits to the public at large as well as the oft-ignored individual defendant are inestimable. The reality and the appearances of fairness will be greatly enhanced, and with the mandated controls imposed upon independent counsel behavior, independent counsel conduct will be more managed and subject to less legitimate criticism. Senator Howard Baker's suggestion for a "cooling off" period was, in essence, a request to avoid the incautious decision-making that can too easily accompany an emotionally charged debate. Hopefully, as the period of recuperation progresses, Congress will recognize that not only is reauthorization necessary, but that the exercise of independent counsel discretion can be effectively, and constitutionally, controlled.

234. See *United States v. McDougal*, 906 F. Supp. 494, 497 (E.D. Ark. 1995) (The court upheld the constitutionality of the amendments in 1994 to § 596(b)(2). For a discussion of the amendment to § 596(b)(2), see *supra* note 87 and accompanying text. The 1994 amendment added certain review requirements upon the division of the court that, in essence, required the court, *again on its own motion*, to periodically determine whether termination of independent counsel activities was warranted. The court in *McDougal* rejected the defendant's claim that the imposition of this extra duty upon the judiciary violated the dictates of *Morrison*.)